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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

WAYMO LLC,

CASE NO. 3:17-cv-00939

14 Plaintiff,

**PLAINTIFF WAYMO'S REPLY
SUBMISSION TO SPECIAL MASTER
COOPER REGARDING UBER'S
OBLIGATION TO PRODUCE JACOBS
LETTER AND RELATED DOCUMENTS**

16 UBER TECHNOLOGIES, INC.;
17 OTTOMOTTO LLC; OTTO TRUCKING
LLC.

Trial Date: February 5, 2018

Defendants

1 As Waymo showed in its Opening Brief, the Jacobs documents are responsive to multiple
 2 document requests and Court orders. The facts set forth in the documents are responsive to
 3 multiple interrogatories. Waymo served a document request seeking documents regarding the
 4 “MISAPPROPRIATED MATERIALS.” The Jacobs letter, which specifically references the
 5 Waymo litigation and theft of Waymo trade secrets, is responsive to this request. Similarly,
 6 Waymo served a request seeking documents relating to the negotiation of Uber’s acquisition of
 7 Otto. The Jacobs letter, which discusses the negotiations between Travis Kalanick and Anthony
 8 Levandowski and that Uber acquired an eight-month old company for \$680 million, is responsive
 9 to this request. The same is true of the other document requests, interrogatories, and Court orders
 10 identified by Waymo. Uber fails to substantively rebut any of this.

11 Uber tries to obscure the reality that the Jacobs documents are responsive to Waymo’s
 12 discovery requests and various Court orders with a variety of excuses. These excuses do not
 13 justify Uber’s failure to produce relevant, responsive documents. Uber has tried to create a
 14 sideshow by arguing that the Jacobs documents did not hit on any negotiated search terms and
 15 therefore did not need to be produced. In its responsive brief, however, Uber does not deny one
 16 key point: ***Uber knew about the documents.*** There is no dispute that Ms. Padilla was aware of the
 17 Waymo litigation, received the Jacobs letter, and understood that the Jacobs letter included the
 18 allegation that Uber stole Waymo’s trade secrets. (11/29/2017 Hr’g Tr. at 14:2-17:14.) There is
 19 also no dispute that Ms. Padilla shared the Jacobs letter with Uber compliance attorneys and
 20 Travis Kalanick (*id.* at 15:17-20, 48:1-49:5), or that the Board of Directors got the Jacobs letter.
 21 (*Id.* at 20:7-17.) Indeed, recently produced documents reveal that the Uber Board [REDACTED]

22 [REDACTED]
 23 [REDACTED] making clear Uber’s understanding of the
 24 overlapping issues in the Waymo and Jacobs matters. (Ex. 17.) There is also no dispute that Ms.
 25 Padilla and others at Uber intentionally chose not to disclose the Jacobs letter to the in-house
 26 attorneys managing this litigation. (11/29/17 Hr’g Tr. at 47:8-25.) Not one of the many cases
 27 Uber cites in its responsive brief holds that it is acceptable for a party to withhold a ***known,***
 28 ***relevant document*** that is responsive to the other party’s discovery requests. Not one. Thus,

1 setting aside the question of whether Uber's outside defense team knew about the Jacobs letter,
 2 there is no question and no dispute that ***Uber***, the party to this litigation, knew about this document
 3 and its relevance to the Waymo litigation, but deliberately withheld it.

4 Further, although Uber and its counsel are withholding information that would provide the
 5 full picture of which MoFo and Boies Schiller attorneys knew of the existence of the Jacobs
 6 documents, his allegations against Uber, and Uber's Jacobs investigation, the information
 7 provided thus far has revealed that Uber's counsel's representations to the Court were half-truths
 8 at best. Uber's counsel represented that only two members of the MoFo trial team received the
 9 resignation email. But those two attorneys, Arturo Gonzalez and Eric Tate, were included on
 10 other emails about that document. And, two other MoFo trial team members—Sylvia Rivera and
 11 Wendy Ray—had communications about the resignation email and e-discovery. Moreover, Boies
 12 Schiller trial team members had communications about the Jacobs investigation in the same week
 13 that Uber chose to disclose Jacobs and his allegations to the U.S. Attorney, but not to Waymo.
 14 While it is undisputed that ***Uber*** knew about the Jacobs documents and their relevance to the
 15 Waymo litigation, there is also a lot of smoke suggesting Uber's outside counsel did too.

16 Uber also does not dispute that the parties never entered into an agreement under which
 17 the parties agreed that they each only needed to use search terms to try to locate responsive
 18 documents. Uber did not point the Court to any such agreement, and does not now identify one to
 19 the Special Master. No such agreement exists. To the contrary, as Waymo showed in its opening
 20 brief, the parties' course of conduct reveals that both sides expected that the parties' searches for
 21 responsive documents would not be limited to using the negotiated search terms and indeed both
 22 parties produced responsive documents that were located without the use of the negotiated search
 23 terms. Although Uber cites to meet and confer correspondence and notes from telephonic meet
 24 and confers, it does not address these points. The negotiated search terms do not excuse Uber's
 25 failure to produce these responsive documents.

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I. UBER FAILS TO REBUT THAT THE JACOBS DOCUMENTS WERE RESPONSIVE AND SHOULD HAVE BEEN PRODUCED IN RESPONSE TO SEVERAL WAYMO RFPS.¹

A. The Jacobs Letter and Resignation Email Are Responsive to Multiple Document Requests.

As Waymo showed in its opening brief, the Jacobs letter and resignation email are responsive to Waymo’s document requests. Uber’s initial response to questions as to whether the Jacobs documents should have been produced is that they did not hit on any negotiated search terms. Uber now contends that the documents are not called for by Waymo’s document requests at all or that Waymo’s requests were somehow objectionable in a way that Uber did not raise during discovery. Uber’s arguments lack merit.

1. The Jacobs Letter and Resignation Email Are Responsive to RFP 73 Because They Discuss Theft of Waymo Trade Secrets.

Uber does not dispute that the Jacobs letter explicitly references the theft of Waymo trade secrets, saying, among other things, that “[t]hese facts corroborate Google’s legal theory in pending litigation that Otto was simply a shell company whose sole purpose was to dissemble Uber’s conspiracy to *steal Waymo’s intellectual property.*” (Ex. 1, at 13 (emphasis added).) Nor does Uber dispute that the resignation email also [REDACTED]

(Ex. 2.)

Instead, Uber argues that the definition of “misappropriated materials” is limited to materials stolen by former Google/Waymo employees, which are not explicitly referenced in the Jacobs documents. This is not credible. The Jacobs letter says that the facts alleged therein “corroborate Google’s theory in the pending litigation . . . “ (Ex. 1, at 13.) Google’s/Waymo’s theory in the pending litigation is that former employees stole trade secrets and then left to join Uber. ***Jacobs says the facts corroborate that theory.*** And who would be stealing Waymo trade secrets for Uber if not former employees? Only a party looking to evade discovery would concoct an explanation such as this and the Special Master and Court should not give it credence.

¹ Uber argues that it is not obligated to produce the Jacobs documents simply because they are generally relevant to the case. Waymo did not argue that Uber was obligated to do so. Rather, Uber was required to produce these documents because they are responsive to several discovery requests and Court orders.

1 Further, at the December 4 hearing, Uber argued that this request was “way overbroad . . .
 2 you could drive a truck through it.” (12/4/17 Hr’g Tr. 35:7-13.) But, while Uber objected to the
 3 request as overbroad, when the parties met and conferred about RFP No. 73, [REDACTED]
 4 [REDACTED]
 5 [REDACTED].” (Rivera Ex. E, at 6.)

6 2. The Jacobs Letter Is Responsive to RFP No. 29 Seeking Documents and
 7 Communications Regarding Negotiations Over Uber’s Acquisition of
Ottomotto.

8 Uber does not dispute that the Jacobs letter states that Ed Russo provided a “fictionalized
 9 account” of two CEOs secretly meeting to discuss an acquisition. (Ex. 1, at 13.) It is also
 10 undisputed that Jacobs surmised that Russo was talking about the negotiations between Travis
 11 Kalanick and Anthony Levandowski regarding Uber’s acquisition of Otto (*id.*), and that Russo
 12 confirmed that he told the group to whom he made the presentation that he was talking about
 13 Kalanick and Levandowski. (11/28/17 Hr’g Tr., 121:19-22.) Hence, the Jacobs letter is
 14 responsive to RFP No. 29 because it discusses the negotiations between Kalanick and
 15 Levandowski that led to the Otto acquisition. Uber did seek to narrow this request after Uber had
 16 the Jacobs letter in its possession to “[REDACTED]”
 17 [REDACTED]

18 “[REDACTED]” (Rivera Ex. E.) But that does not make the Jacobs letter non-
 19 responsive as Uber contends. The Jacobs letter is responsive to RFP No. 29 as narrowed. It
 20 references the negotiations between Kalanick and Levandowski, which undoubtedly included
 21 discussions about consideration and the IP acquired. Certainly, Uber does not say otherwise.
 22 Moreover, Uber produced many documents relating to the negotiations that do not fall directly
 23 into these three categories. Examples include calendar invites for meetings, emails discussing
 24 Levandowski’s reputation, and emails discussing the value of the team Levandowski would bring
 25 over and the value of the acquisition. In other words, Uber rightfully produced negotiation
 26 documents that are not strictly about [REDACTED]. This shows that
 27 Uber did not read the narrowed RFP 29 as narrowly as it now does. The Jacobs letter should have
 28 been produced.

1 3. The Jacobs Letter and Resignation Email Are Responsive to RFP No. 72
 2 Because They Discuss Policies for Employees' Use of Other Devices While
 3 Working at or for Uber.

4 Uber does not dispute that the Jacobs letter discusses Uber's instructions to use non-
 5 attributable devices for work, and specifically that SSG members traveled to Pittsburgh to educate
 6 the Uber ATG team on use of ephemeral communications, non-attributable devices, and false
 7 attorney-client privilege designations to prevent discovery after Levandowski joined ATG and was
 8 using non-Uber-issued computers in connection with his work there. (Ex. 1, at 13.) Nor does
 9 Uber dispute that [REDACTED] (Ex. 2.) While Waymo agreed to narrow
 10 this request after Uber had already failed to produce the Jacobs documents to Levandowski's use
 11 of a personal computer *and other devices*, the Jacobs documents are still responsive. Although
 12 Uber points to the narrowing of this request, it does not dispute that to the extent that
 13 Levandowski used non-attributable devices, the Jacobs letter is responsive because it discusses
 14 policies advocating use of such non-attributable devices.

15 4. The Jacobs Letter and Resignation Email Are Responsive to RFP 91
 16 Because They Refer to the Use of Non-Attributable Devices.

17 Uber does not dispute that both the Jacobs letter and resignation email refer to the use of
 18 non-attributable devices. As Waymo argued in its opening brief, to the extent Levandowski used
 19 non-attributable devices, both documents would be responsive to this request. Uber contends that
 20 the Jacobs documents do not mention Levandowski authorized devices, and that there has never
 21 been evidence that Levandowski used non-attributable devices. This is a circular argument.
 22 Because Uber withheld the Jacobs document and the use of non-attributable devices by Uber,
 23 Waymo had no reason to take discovery from Levandowski or anyone else as to whether
 24 Levandowski ever used a non-attributable device. Notably, Uber does not submit a declaration
 25 saying that he never did.² If he did, the Jacobs documents are responsive to RFP 91.

26 ² On December 4, Uber disclosed an "inventory" of non-attributable devices. (Exs. 18, 19.)
 27 But it noted that the inventory was based on information "developed to date," and there is no
 28 indication of whether that is a current inventory or that it reflects all non-attributable devices ever
 used by Uber employees. If it is only a current inventory, then it is not surprising that
 Levandowski is not on the list. Waymo has not yet had the opportunity to take discovery on this
 issue, and Uber refuses to provide a narrative description of the results of its investigation into the
 extent of use of non-attributable devices by Uber.

1 5. Uber's Remaining Arguments About Waymo's Document Requests Are
 2 Meritless.

3 Uber's other arguments regarding whether the Jacobs documents are responsive should be
 4 rejected. Initially, Uber complains about the definitions in Waymo's requests. (*Id.* at 6.) For
 5 example, Uber claims that Waymo's definition of "DOCUMENTS" is overbroad. But Uber never
 6 made this objection previously so it was waived. (Rivera Ex. A); *Amatrone v. Champion*, 2017
 7 WL 1064976, *2 (N.D. Cal Mar. 21, 2017) (slip copy) ("To the extent that Plaintiffs now offer a
 8 different reason for their failure to respond . . . Plaintiffs waived that objection by failing to make
 9 it in their responses.") Further, even if the definition of "DOCUMENT" was overbroad, that does
 10 not mean that Uber did not have an obligation to produce responsive documents. Regardless of
 11 the definition, the Jacobs letter is obviously a document. Uber does not, nor could it, credibly
 12 claim otherwise. The same is true of Uber's belated objections to Waymo's definition of
 13 "COMMUNICATIONS."³

14 Uber also cites case law that is inapplicable to this situation. (Uber Resp. Brief, at 4-6.)
 15 The cited cases arise out of motions to compel and therefore are procedurally distinguishable.
 16 Those cases address whether a party should be compelled to produce a document or category of
 17 documents. That is not the issue before the Special Master here. The issue here is whether these
 18 documents that have now been produced should have been produced earlier.

19 Uber's cited cases also repeat the standard in Rule 34 that a request for production must be
 20 reasonably particular. Just because Uber has voluminous documents regarding the negotiation of
 21 the Otto acquisition, however, does not make a request for all such documents not reasonably
 22 particular. Moreover, whether Waymo's document requests are reasonably particular is now moot
 23 because Uber already stated objections where it had them, and the parties met and conferred and

24 ³ And as Uber recognizes in a footnote, Uber's definitions of "DOCUMENTS,"
 25 "COMMUNICATIONS," and "REGARDING" are equally broad. (Uber Resp. Brief, at 8 n.1; Ex.
 26 24 (Uber giving DOCUMENTS, for example, the "broadest possible meaning"). Uber argues that
 27 the fact that it used broad definitions does not "excuse" Waymo from purportedly violating the
 28 Federal Rules by using broad definitions. (Uber Resp. Brief, at 8.) This makes no sense. Uber is
 apparently claiming even though it also used broad definitions in its document requests, it is not
 obligated to produce responsive documents because Waymo's definitions are broad. Further, the
 cases Uber cites for this proposition are not relevant. They address the situation in which a party
 tries to excuse non-disclosure on the other side's non-disclosure. That is not the situation here.

1 reached agreement on the scope of the requests. In any event, as shown above, the Jacobs letter
 2 and resignation email are responsive to Waymo's document requests, even as narrowed by the
 3 parties. Finally, the cases Uber cites do not address this situation where a specific, responsive
 4 document is identified as having been withheld. And, not one of those cases holds that it is
 5 acceptable to withhold a known, responsive document.

6 B. **The Search Protocol Did Not Limit the Parties' Obligations to Using Search**
 7 **Terms.**

8 It is undisputed that the issue of search terms is not relevant to Uber's obligation to locate
 9 and produce hard copy versions of the Jacobs letter or resignation email. An electronic search
 10 protocol is irrelevant to locating hard copy documents. Although Waymo asked whether there
 11 were hard copies of the Jacobs letter or resignation email a week ago, Uber has not responded and
 12 does not address this point in its responsive brief. Waymo cited in its opening brief the evidence
 13 suggesting that there are likely hard copies of these documents. (Waymo Opening Brief, at 5-6
 14 (citing Ms. Padilla's testimony).)

15 With respect to electronic copies of the documents, the fact that the Jacobs letter and
 16 resignation email would not have hit on negotiated search terms does not excuse Uber's failure to
 17 produce these known documents. In a meet and confer last week, the Special Master indicated
 18 that he thought it was important whether the parties entered into an agreement that their searches
 19 would be limited to the use of the negotiated terms. Uber nevertheless does not dispute that the
 20 parties never entered into an agreement under which the parties agreed that they each only needed
 21 to use search terms to try to locate responsive documents. Uber does not point to any such
 22 agreement. There isn't one. To the contrary, both parties expected that the other side would not
 23 limit its searches to the negotiated search terms and both parties did not limit their searches for
 24 responsive documents to documents hitting on negotiated search terms. Uber does not deny that
 25 its counsel warned Waymo that: "*Waymo has an obligation to conduct a reasonable search for*
responsive documents separate and apart from any search term negotiations." (Ex. 5 (7/20/17
 26 Email from M. Pritt) (emphasis added)); *see also* (Ex. 4 (7/6/17 Email from M. Pritt)). Nor does
 27 Uber dispute that on multiple occasions, Waymo wrote that it was conducting searches that went
 28

1 beyond the negotiated search terms, such as saying “[w]e conducted a reasonably diligent search
 2 in response to Defendants’ document requests using appropriate search terms, ***as well as***
 3 ***additionally searching for responsive documents in various custodial and non-custodial***
 4 ***repositories without the use of electronic search terms.***” (Ex. 6 (7/25/17 Letter from A. Roberts
 5 to M. Pritt) (emphasis added)); Dkt. 1090; (Ex. 7 (8/8/17 J. Nardinelli Email)). Uber also does not
 6 dispute that Waymo’s counsel made representations like this by phone. And, Uber does not
 7 dispute that Uber itself did not limit its searches for responsive documents to using the negotiated
 8 search terms, having produced documents that do not hit on search terms, such as the Board of
 9 Directors meeting minutes, and searching beyond custodial emails. (UBER00101507,
 10 UBER00101505); (Ex. 8 (6/14/17 Email from A. Roberts)); (Ex. 9 (7/3/17 Email from A. Roberts
 11 to E. Takashima); (Ex. 10 (Attachment to 7/3/17 Email from S. Rivera)). All of this demonstrates
 12 that the parties’ agreement and course of conduct was that they would agree on a set of negotiated
 13 terms, but that did not absolve the parties of the obligation to search for responsive documents
 14 using other means or to produce known, responsive documents. Uber does not even try to show
 15 otherwise.

16 Rather than contest this history, Uber cites to various other statements in the parties’
 17 correspondence and meet and confers, none of which are inconsistent with the above, undisputed
 18 statements. For example, as it did at the December 4 hearing, Uber cites to an August 8 email
 19 from Jeff Nardinelli, arguing that Waymo took the position that searches were limited to the
 20 agreed terms. (Ex. 7; Rivera Ex. 10.) As Waymo pointed out in its opening brief, that is incorrect.
 21 Instead, in that email, Mr. Nardinelli wrote to Max Pritt that Mr. Nardinelli’s responses were
 22 “inline in bold.” (Ex. 7.) Then, in those inline responses, Mr. Nardinelli wrote, regarding RFP
 23 165, “[i]n addition to running the terms agreed to by the parties over the list of custodians agreed
 24 to by the parties, Waymo is additionally searching for documents sufficient to show the amount
 25 and timing of all payments made to employees under the Project Chauffeur bonus program.” (Ex.
 26 7.) And, as to RFP 166, Mr. Nardinelli wrote, “Waymo has produced responsive documents
 27 located after talking with HR personnel and will further produce all responsive documents located
 28 by running the terms agreed to by the parties over the list of custodians agreed to by the parties.”

1 (Id.) Uber ignores this altogether.

2 Uber also cites correspondence from the parties' first week of search term negotiations,
 3 arguing that during a July 1 meet and confer, Mr. Nardinelli said that there should be a
 4 presumption that if the parties used the agreed upon search terms, the searches would be sufficient.
 5 (Uber Resp. Brief, at 13.) Uber, however, relies on its counsel's own notes from that meet and
 6 confer and still does not quote Mr. Nardinelli's full statement: "How would this affect challenges
 7 to productions in response to RFPs after we agree on these terms and custodians? **Would we still**
 8 **be able to challenge a production on a given RFP? I don't think we necessarily want to give up**
 9 **our right to challenge**, but it seems like there should at least be a presumption that if we use the
 10 agreed upon search terms and custodians that the production is sufficient." (Brimer Dec., Ex. A)
 11 (emphasis added). Uber also ignores that this was the parties' very first discussion about whether
 12 they would exchange search terms. No specific terms of an agreement were proposed on that call,
 13 and none were agreed to. The parties never entered into an agreement that there was a
 14 "presumption" that a production was sufficient, or that the opposing party could not challenge a
 15 production.

16 Similarly, Uber points to a July 7 meet and confer and says that, according to Uber's
 17 counsel's notes, Andrea Roberts stated that Waymo wanted to reach agreement on the
 18 "boundaries" of discovery. (Uber Resp. Brief, at 13.) However, the notes Uber relies on reveal
 19 that Ms. Roberts was referring to a statement in Mr. Pritt's email indicating that *Uber* would be
 20 demanding more searches of Waymo. (Brimer Dec., Ex. C.) Waymo wanted an understanding of
 21 the full scope of the searches that *Uber* would demand Waymo conduct. At no point did Waymo
 22 ever say its searches for responsive documents would be limited to Uber-proposed search terms.
 23 Nor would that make any sense. Uber continued to serve requests for production on Waymo well
 24 after proposing search terms. Waymo still responded to those later-served document requests and
 25 searched for and produced responsive documents, even if the negotiated search terms were not
 26 directed at those requests. Had Waymo not done so and pointed to the negotiated search terms as
 27 an excuse, Uber surely would have complained.

28 Uber also argues that Waymo never took issue with the non-custodial sources that Uber

1 searched. (Uber Resp. Brief, at 15.) It is unclear what the relevance of this is. But, based on
 2 Uber's productions and the parties' meet and confer discussions, Waymo did not have reason to
 3 believe that Uber was not searching appropriate non-custodial sources. Since Waymo had no idea
 4 of the existence of the Jacobs letter, how could Waymo have known that Uber was withholding it?

5 Lastly, Uber cites case law supporting using search terms to search ESI. (Uber Resp.
 6 Brief, at 12.) This law has no relevance here. Indeed, Waymo does not dispute that search terms
 7 can be an effective way to search for responsive documents. That is why Waymo suggested
 8 negotiating an ESI Order in the first place. But that does not mean that searches for responsive
 9 documents were strictly limited to using the negotiated search terms. As demonstrated above, and
 10 as is undisputed by Uber, there was no such agreement. Thus, the fact that the Jacobs letter and
 11 resignation email—both ***known documents***—did not hit on negotiated search terms is no excuse
 12 for withholding the documents.

13 C. **The Jacobs Letter and Resignation Email Were Known to Uber and Its
 14 Counsel.**

15 As Waymo explained in its opening brief, search terms are useful to help parties search
 16 large volumes of ESI to find responsive documents; they do not obviate a party's discovery
 17 obligations once responsive documents are already found. Here, there is no dispute that the Jacobs
 18 letter and resignation email were already found; they were known to Uber and its counsel.
 19 Waymo laid out the evidence supporting this point in its opening brief, and Uber did not respond.
 20 (Waymo Opening Brief, at 10-11.)

21 In addition to the facts shown in Waymo's opening brief, Waymo has learned more about
 22 the extent of Uber's counsel's knowledge through the WilmerHale communications log.
 23 According to the log, MoFo attorneys were having frequent communications with Uber and
 24 Wilmer about the Jacobs investigation in the days and weeks prior to Uber receiving the May 5
 25 Jacobs letter. (Ex. 20.) Although counsel's representations to the Court left the impression that
 26 MoFo's involvement in the investigation ended on May 4, before the Jacobs letter was received,
 27 the Wilmer log shows continued communications into June 2016. The Wilmer log also reveals the
 28 names of additional MoFo attorneys involved in these discussions who were not previously

1 disclosed, Joshua Hill and Sue Sedgwick. (*Id.*) Waymo also learned that Karen Dunn and Ed
 2 Takashima from Boies Schiller discussed the Jacobs investigation with Uber and Wilmer in late
 3 June 2016. According to the log, the documents themselves were not discussed. (*Id.*) That is of
 4 no matter because if Wilmer, Uber and outside counsel were discussing Jacobs' allegations and
 5 investigation, it should have been obvious to outside counsel that there may be documents laying
 6 out those allegations. In any event, Boies Schiller's involvement was right around the time that
 7 Uber voluntarily decided to disclose Jacobs and his allegations to the U.S. Attorney—but not
 8 Waymo—and just a few days before Ed Takashima proposed on the parties' July 1 meet and
 9 confer that the parties exchange search terms. (Brimer Dec., Ex. A.)

10 The log that MoFo served on December 10 further reveals that the resignation email was
 11 known to members of the MoFo trial team, including Arturo Gonzalez, Sylvia Rivera, and Wendy
 12 Ray. (Ex. 21.) Indeed, according to the log, Mr. Gonzalez and Mr. Tate, who received the
 13 resignation email, were on multiple emails regarding that email. And, Ms. Rivera and Ms. Ray
 14 were on multiple communications about the resignation email as well. (*Id.*) According to the log,
 15 Ms. Rivera and Ms. Ray were involved in communications about "legal advice and work product
 16 regarding Uber's ediscovery systems." (*Id.*) And, the Special Master should be aware from
 17 having overseen months of meet and confers in this case that both Ms. Rivera and Ms. Ray
 18 handled defensive document production issues in this case, and Ms. Rivera seemed to be primarily
 19 responsible for that portion of the case. What could these MoFo defense team members have been
 20 discussing which related to the resignation email *and* e-discovery? It certainly looks like they
 21 were discussing how to avoid disclosure of the resignation email in e-discovery. Indeed, when the
 22 parties ultimately agreed to exchange the search terms that they used on July 3, Ms. Rivera
 23 circulated Uber's initial set of terms, which did not include "Waymo" as a search term, and only
 24 searched for emails with the word "Otto" through August 24, 2016. (Ex. 10.) Put another way,
 25 Uber's outside litigation counsel provided search terms that would not hit on the Jacobs
 26 documents, and those search terms served as the starting point for the parties' negotiations.

27 Waymo also notes that the outside counsel communication logs only reveal written
 28 communications; Uber has not disclosed the extent to which defense counsel orally communicated

1 about the Jacobs documents or investigation. Given Uber's undisputed knowledge of these
 2 documents, however, they should have been produced.

3 **II. THE INFORMATION IN THE DOCUMENTS AT ISSUE SHOULD HAVE BEEN**
DISCLOSED IN RESPONSE TO INTERROGATORIES.

4 The information disclosed in the Jacobs letter and resignation email is responsive to
 5 Common Interrogatory No. 8 and Expedited Interrogatory No. 6. Initially, as to both, Uber argues
 6 that the interrogatories call for *facts*, not documents. The facts set forth in the Jacobs documents
 7 are responsive to both interrogatories. Thus, even if Uber was not required to cite to the
 8 documents in the interrogatory responses, Uber was required to disclose the facts therein. It did
 9 not. Of course, had Uber responded acknowledging the facts disclosed in the Jacobs letter, that
 10 would have allowed the parties to pursue them during fact discovery, as opposed to in a rushed
 11 manner after a second extension of the trial date.

12 A. **The Facts in the Jacobs Documents Are Responsive to Common Interrogatory**
No. 8 Seeking Policies and Practices With Respect to the Retention and/or
Destruction of Documents.

13 Uber does not dispute that the Jacobs letter includes allegations about policies for
 14 destruction of documents. Uber argues that these facts are not responsive to the interrogatory
 15 because the allegations are untrue. Uber does not cite *any* evidence to support this. It does not
 16 submit any declarations or cite any witness testimony in support of the assertion that the
 17 statements in the Jacobs letter about policies and practices with respect to retention and/or
 18 destruction of documents "do not reflect Uber's actual policies and practices." (Uber Resp. Brief,
 19 at 5.) Moreover, Uber does not dispute that Uber employees use ephemeral communications and
 20 non-attributable devices for business purposes. (Exs. 14, 17.) The policies and practices with
 21 respect to retention and destruction of ephemeral communications or documents on non-
 22 attributable devices are responsive to this interrogatory, and neither are addressed in Uber's
 23 response.

24 B. **The Facts in the Jacobs Documents Are Responsive to Expedited**
Interrogatory No. 6 Seeking Uber's Efforts to Preserve Evidence Relevant to
This Case.

25 Again, Uber does not dispute that the Jacobs letter describes systems set up for the purpose
 26

1 of destroying evidence. Information about those systems is responsive to Uber’s response
2 regarding its efforts to preserve evidence relevant to this case. Uber argues that the Jacobs
3 documents are not called for by this interrogatory because it asks about document preservation for
4 this case, and Jacobs does not allege failure to preserve documents in this case. (Uber Resp. Brief,
5 at 4.) But, he does. Jacobs alleges: “Henley and Clark implemented this program of ephemeral
6 and encrypted communications for the express purpose of destroying evidence of illegal or
7 unethical practices to avoid discovery in actual or potential litigation” (Ex. 1, at 6); “Clark and
8 Henley directly instructed Jacobs to conceal documents in violation of Sarbanes-Oxley by
9 attempting to ‘shroud’ them with attorney-client privilege or work product protections” (*id.*);
10 “Clark taught the ThreatOps team that if they marked communications as “draft,” asked for a legal
11 opinion at the beginning of an email, and simply wrote “attorney-client privilege” on documents,
12 they would be immune from discovery” (*id.* at 6-7); “By storing this data on non-attributable
13 devices, Uber believed it would avoid detection and never be subject to legal discovery. This is
14 because a standard preservation of evidence order typically focused on Uber work laptops, Uber
15 networks, and Uber mobile devices” (*id.* at 7). Jacobs clearly alleges: “Clark and Henley’s
16 directives described above *specifically implicate ongoing discovery disputes, such as those in*
17 *Uber’s litigation with Waymo.*” (*Id.* at 9) (emphasis added). Further, Waymo learned that some
18 custodians used Wickr and other ephemeral communications (Ex. 14), but Uber’s interrogatory
19 response does not disclose that. Waymo also learned from recently produced documents that [REDACTED]
20 [REDACTED]
21 [REDACTED] (Ex. 22), and [REDACTED]
22 [REDACTED] (Ex. 23). This suggests that they were likely aware of the shadow systems disclosed in
23 the Jacobs letter and used them. To the extent that their use did not comply with Uber’s litigation
24 hold, that should have been disclosed in response to this interrogatory.

25 III. **THE JACOBS LETTER WAS RESPONSIVE AND SHOULD HAVE BEEN
PRODUCED PURSUANT TO THE COURT'S ORDERS.**

The April 14 resignation email and May 5 Jacobs letter should have been produced in response to this Court's orders, specifically the March 16 Expedited Discovery Order, April 4

1 Order, and Preliminary Injunction Order.

2 Uber argues that the Jacobs documents are not responsive to the March 16 expedited
 3 discovery order because they do not refer to downloading by Levandowski, Kshirsagar, and
 4 Raduta, whereas the Court's order does:

5 By March 31, defendants shall produce for inspection all files and documents
 6 downloaded by Anthony Levandowski, Sameer Kshirsagar, or Radu Raduta
 7 before leaving plaintiff's payroll and thereafter taken by them. Defendants shall
 8 also produce for copying the card reader, thumb drive, or other media used for the
 9 downloads, as well as all subsequent emails, memoranda, PowerPoints, text
 messages, or notes that have forwarded, used, or referred to any part of said
 downloaded material. If any part of said downloaded material has been deleted,
 destroyed, or modified, then defendants shall state the extent thereof and produce
 all documents bearing on said deletion, destruction, or modification.

10 (Dkt. 61 ¶ 4.) But, the Jacobs letter references misappropriation of Waymo trade secrets and
 11 describes efforts by Uber to delete and destroy evidence of such misappropriation. (Ex. 1, at 9-10.)
 12 Just because the letter does not call Levandowski out by name does not mean that the letter is not
 13 responsive. Under Uber's logic, Waymo would first need to prove misappropriation by Levandowski
 14 or the other two former employees referenced before Uber would be obligated to do anything in
 15 response to the Court's order. Jacobs specifically referenced the Waymo litigation in his letter, and
 16 Waymo alleges that Levandowski stole Waymo trade secrets and took them to Uber. The
 17 misappropriation of Waymo trade secrets referenced in the Jacobs letter is the same misappropriation
 18 alleged by Waymo.

19 The Court's April 4 Order asked Defendants to provide "[a] list of all servers (and their
 20 locations) used at any time in any way for defendants' LiDAR-related activities. Do not leave
 21 anything off the list merely because some other server supposedly houses the same materials."

22 (Dkt. 144.) Uber does not dispute that the Jacobs letter says that Uber had a "distributed
 23 architecture of anonymous servers, telecommunications architecture, and non-attributable
 24 hardware and software." (Ex. 1, at 12.) Uber contends that it did not need to disclose them in
 25 response to the April 4 letter because the Jacobs letter does not mention servers used for LiDAR-
 26 related activities. Again, the Jacobs letter specifically references that the allegations of Uber's
 27 tactics implicate the Waymo litigation. Even if the Jacobs letter does not identify whether the
 28

1 referenced anonymous servers were used for LiDAR-related activities, if they were, Uber was
 2 obligated to identify them in response to the April 4 Order. Notably, Uber does not state that the
 3 anonymous servers referenced in the Jacobs letter are not used for LiDAR-related activities.

4 Lastly, as Judge Alsup already recognized, the Jacobs letter and email should have been
 5 disclosed in response to the May 11 Provisional Relief Order. (11/28/2017 Hr'g Tr. at 14:13-17
 6 (“Morrison & Foerster and the rest of the Uber lawyers withheld evidence. There was a direct
 7 order to produce stuff like that in the provisional relief order. And to get – to – to have hidden this
 8 from the lawyers and the judge and not be upfront about it, it just is so upsetting.”).) Uber argues
 9 that these materials are not responsive because Jacobs did not see or hear the downloaded
 10 materials and did not allege that Levandowski used ephemeral communications to discuss LiDAR.
 11 Uber does not present any evidence that he did not do so. And, Uber should know this because it
 12 was required under the provisional relief order to log all communications wherein Levandowski
 13 mentioned LiDAR. Yet, Uber did not include any communications via Wickr or Telegram—
 14 which it now admits Levandowski used for business purposes—on its LiDAR communications
 15 log. To the extent Mr. Levandowski was using these forms of communication to develop LiDAR
 16 technology, that too would have been responsive to the Court’s Order. Uber does not dispute this
 17 point.

18 IV. **THE JACOBS LETTER AND RESIGNATION EMAIL SHOULD HAVE BEEN**
PRODUCED BECAUSE THEY DIRECTLY CONTRADICT MULTIPLE
REPRESENTATIONS MADE BY UBER AND ITS COUNSEL.

20 The existence of the Jacobs letter and email is also responsive to deposition questions
 21 asked of Uber witnesses. In those circumstances, Uber was obligated to produce it. Uber argues
 22 that Waymo does not cite any legal authority for this premise. But, Waymo cited to Judge Alsup’s
 23 statements at the December 4 hearing:

24 Let’s say that a particular document had never been requested, but that in
 25 deposition testimony the CEO of the company, some important witness, just gave
 26 testimony that was just flat out opposite of what was in a letter. Then I think
 27 maybe in that kind of circumstance the lawyer may have a duty to turn the letter
 over, because you can see the problem. It’s – you know, otherwise they are putting
 forth a story that is directly contradicted by things they haven’t produced even
 though they weren’t called for.

28 (12/4/17 Hr'g Tr., 34:6-12.)

1 Waymo set forth specific testimony and attorney argument that is contradicted by the
 2 Jacobs letter. Uber does not substantively rebut the testimony or attorney argument, but says that
 3 the testimony and attorney argument do not contradict the Jacobs letter. Waymo disagrees and,
 4 more importantly, so does Judge Alsup. As he explained at the November 28 hearing:

5 I would look like a fool if Uber were to fool me on this. You told me many times
 there were -- none of these documents ever hit the server.

6 MR. GONZÁLEZ: We stand by that.

7 THE COURT: Okay. Well, it turns out the server is only for the dummies, and that
 8 the real stuff goes on, on the shadow system. So now you deny that, but that's
 9 what -- that's one way to read this record so far. And it would not be fair to the
 10 other side to not give them a chance -- you should have come clean with this long
 ago. He should have given me that letter back in May so they could have
 investigated it.

11 (11/28/17 Hr'g Tr. at 149:7-18.) The Jacobs letter contradicts both counsel's arguments to the
 12 Court and the deposition testimony of Ms. Padilla and Mr. Kalanick regarding Uber's searches.

13 V. **UBER DID INTENTIONALLY WITHHOLD THE JACOBS DOCUMENTS.**

14 Finally, Uber includes in its responsive brief a separate section arguing that it did not
 15 intentionally withhold the Jacobs documents because outside counsel did not get copies of the
 16 Jacobs letter. But, ***Uber***—the party to this lawsuit—knew about all of these documents. And,
 17 ***Uber*** made the intentional decision to not disclose the Jacobs letter to the in-house counsel
 18 running this litigation. Ms. Padilla testified that the internal Uber compliance lawyers instructed
 19 her not to disclose the Jacobs letter to anyone, which included litigation counsel running the
 20 litigation. (11/29/17 Hr'g Tr. at 47:8-25.) Ms. Padilla also claimed that she thought if Uber
 21 disclosed the Jacobs letter to the U.S. Attorney, the U.S. Attorney would produce the Jacobs letter
 22 to the Court and Waymo. (*Id.* at 53:14-54:5.) The Court did not find that to be credible. (*Id.* at
 23 54:6-16.) Regardless of what the outside defense team knew or did not know, the facts suggest
 24 that ***Uber*** intentionally withheld these documents.⁴

25

26

27 ⁴ Uber references Waymo's use of ephemeral communications in its brief. That has no
 28 relevance here. The question before the Special Master is whether Uber should have produced the
 Jacobs documents to Waymo. Whether Waymo uses ephemeral communications has no bearing
 on that question.

1 VI. **CONCLUSION**

2 For the foregoing reasons, the Special Master should find and recommend to Judge Alsup
3 that Uber should have produced the Jacobs documents to Waymo during discovery.

4 DATED: December 21, 2017

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